CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

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OF CALIFORNIA

In re: Request for Regulatory Determination filed by Donnell Jameison concerning the Department of Correction's Administrative Bulletin No. 88/24 ("life prisoner minimum parole eligibility")[1]	1989 OAL Determination No. 14 [Docket No. 89-001] September 21, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a bulletin issued by the Department of Corrections, which prescribes how to calculate the minimum eligible parole date for inmates serving an indeterminate life term, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

We find that those portions of the bulletin, which effectively eliminate worktime credits earned by indeterminate life term inmates prior to notice of their ineligibility to earn such credits, fall within the definition of a "regulation," requiring adoption in compliance with the Administrative Procedure Act. The remaining portions of the challenged bulletin are either restatements of existing law, which do not meet the definition of a "regulation," or are otherwise exempt from the requirements of the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether the Department of Correction's ("Department") Administrative Bulletin No. 88/24 concerning life prisoner minimum parole eligibility is (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore (3) violates Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

The Office of Administrative Law finds that:

I. The Department's Bulletin is subject to the requirements of the APA[9];

II. For paragraphs 1 and 2 of the Bulletin:

A. Prior to the issuance of In re Monigold ("Monigold II")[10]:

(1) Both paragraphs fell within the APA definition of a "regulation" and therefore violated Government Code section 11347.5, subdivision (a);

B. Following the issuance of Monigold II:

(1) Insofar as both paragraphs reflect existing law--i.e., that inmates sentenced to 15 years to life, 25 years to life, or life with possibility of parole are not entitled to earn worktime credits--the paragraphs are not regulatory and do not violate Government Code section 11347.5, subdivision (a).

(2) Insofar as both paragraphs conflict with existing law--i.e., that inmates sentenced to 15 years to life, 25 years to life, or life with possibility of parole are entitled to all worktime credit earned prior to being notified of their ineligibility for such credits--the paragraphs fall within the APA definition of a "regulation" and therefore violate Government Code section 11347.5, subdivision (a).

III. Paragraphs 3 and 5 of the Bulletin reflect existing law and therefore do not fall within the APA definition of a "regulation."

IV. Although paragraph 4 of the Bulletin falls within the APA definition of a "regulation," it is nonetheless exempt from the requirements of the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[11] The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"[12] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[13]

Authority [14]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

In any event, the APA generally applies to all state agencies, except those "in the judicial or legislative departments."[15] Since the Department is in neither the judicial nor the legislative branch of state government, the APA rulemaking requirements generally apply to the Department.[16,17]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations. Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have

addressed "deep seated problems of agency accountability and responsiveness"[18] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[19] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[20]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 225 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.[21] The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. (An "Administrative Bulletin" is the subject of this determination.) Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual[22] and parts of the Administrative Manual[23] (and unincorporated "Administrative Bulletins"[24])--for failure to comply with APA requirements.[25] OAL regulatory determinations have found the Classification Manual,[26] several portions of the

Administrative Manual,[27] and two sections and several chapters of the Case Records Manual[28] to violate Government Code section 11347.5.[29]

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.[30] These plans often repeat parts of statutes, Director's Rules, and procedural manuals.[31]

Background

To facilitate better understanding of this determination, we set forth the following undisputed facts and relevant statutes, regulations and case law.

A. Facts Related to This Determination

On July 1, 1977, California's determinate sentencing law, Penal Code section 1170, went into effect. Basically, this new sentencing statute prescribed three specific time periods from which the court must choose in sentencing a person convicted of a particular crime to a state prison. The objective of the determinate sentencing law was to eliminate disparity and provide for uniformity of sentences throughout the state.[32]

If a person is sentenced to state prison, but not pursuant to Penal Code section 1170, he or she is then considered to be sentenced under Penal Code section 1168, subdivision (b). Section 1168, subdivision (b), provides for sentencing to state prison without a fixed term or duration of the period of imprisonment. This is called "indeterminate sentencing."[33] For purposes of this determination we are concerned only with three indeterminate sentences--(1) confinement in a state prison for a term of 25 years to life (e.g., for first degree murder)[34], (2) confinement in a state prison for a term of 15 years to life (e.g., for second degree murder), and (3) life with possibility of parole (e.g., for kidnapping where the victim does not suffer death or bodily harm).

Penal Code section 190 was repealed and reenacted in November 1978 by the people of California in an initiative measure (Proposition 7). As reenacted, section 190 read:

> "Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

> "Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.
>
> "The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time."[35] [Emphasis added.]

One of the purposes of section 190 was to increase the penalties for first and second degree murder.[36] Section 190 makes reference to the "provisions of Article 2.5 (commencing with Section 2930) . . . [which] shall apply to reduce any minimum term of 25 or 15 years in a state prison pursuant to this section." (Emphasis added.) At the time section 190 went into effect, Article 2.5 consisted of only three sections--2930, 2931, and 2932.

The Legislature added two additional sections--2933 and 2934 --to Article 2.5, effective January 1, 1983. Section 2933, subdivision (a), provides in part:

> "It is the intent of the Legislature that persons convicted of a crime and sentenced to state prison, under Section 1170, serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections . . .. For every six months of full-time performance in a credit qualifying program, . . . a prisoner shall be awarded worktime credit reductions from his term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance . . .." [Emphasis added.]

Section 2934 provides in part that:

> "Under rules prescribed by the Director of Corrections, a prisoner subject to the provisions of Section 2931[37] may waive the right to receive [one-third good behavior] time credits as provided in Section 2931 and be subject to the [one-half worktime credit] provisions of Section 2933." [Emphasis added.]

Title 15, California Code of Regulations ("CCR")[38], sections 3043 and 3043.1 were adopted by the Department to interpret and implement Penal Code sections 2933 and 2934.[39] Section 3043, subdivision (c)(1), located in Article 3.5 entitled "Credits," provides:

> "(c) Worktime
>
> (1) An inmate serving a determinate term of imprisonment or an indeterminate term of 15 years to life or 25 years to life, for a crime committed on or after January 1, 1983, or who has waived their [sic] right to behavior and participation credits as provided in Penal Code Section 2934, may earn a reduction in their term of imprisonment or minimum eligible parole date, from the date of reception by the department or effective date of the waiver. Such credit reduction may be earned for participation in work, educational or vocational training assignments." [Emphasis added.]

This regulation had previously been applied to grant "day-for-day" worktime credits under Penal Code section 2933 to inmates serving indeterminate life sentences. That practice stopped shortly after the Attorney General of the State of California issued an opinion ("Attorney General's Opinion"), dated March 24, 1987 (No. 86-1102), concluding that inmates serving indeterminate life sentences were not entitled to worktime credits under section 2933.[40] Thereafter, the Board of Prison Terms, the state agency that sets parole dates for California state prisoners, issued Administrative Directive No. 87/4 ("AD 87/4"), dated April 1, 1987, which stated in part:

> "The Attorney General concluded that state prisoners serving sentences of 25 years to life, 15 years to life, or life with possibility of parole are not eligible for worktime credits under Penal Code section 2933 . . . .
>
> "To comply with this opinion, the [Board] will cancel all initial life parole consideration hearings previously scheduled for prisoners who are serving 25 years to life and 15 years to life sentences and will rescind decisions rendered in hearings conducted prior to issuance of the Attorney General's opinion. Henceforth, prisoners serving 25 years to life and 15 years to life sentences will not be scheduled for initial life parole consideration hearings based on reduction of their minimum eligible parole dates by earning worktime credits pursuant to Penal Code Section 2933. These life prisoners may still have their

> minimum eligible parole dates reduced by one-third by earning good behavior and participation credits pursuant to Penal Code sections 2930 and 2931." [Emphasis added.]

On May 1, 1987, Robert R. Smith (a prisoner serving an indeterminate life sentence who had earned worktime credits after waiving his right to earn credit under section 2931 of the Penal Code) filed a Request for Determination with OAL concerning AD 87/4.

On February 16, 1988, OAL issued its determination on the challenge to AD 87/4. OAL concluded that:

> ". . . the Board's Administrative Directive No. 87/4, which interprets statutory worktime provisions as not being applicable to prisoners who are serving 15 years or 25 years to life, or life with possibility of parole, is (1) subject to the requirements of the APA, (2) is a 'regulation' as defined in the APA, and (3) is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of state in accordance with the APA."[41]

B. Facts Giving Rise to This Determination

Following OAL's determination regarding AD 87/4, the Department of Corrections issued Administrative Bulletin No. 88/24 ("AB 88/24" or "challenged rule") on the subject of "Life Prisoner Minimum Parole Eligibility," dated March 2, 1988. AB 88/24 states in part:

> "This bulletin supersedes an Instructional Memo entitled Interim Procedures Re: Work Credits for 15-Life and 25-Life Prisoners issued May 27, 1987, and complies with the Attorney General's Opinion and Board of Prison Terms (BPT) Administrative Directive Number 87/4 . . . . The following policy shall be immediately implemented for affected inmates until the Opinion is either upheld or ruled invalid by the courts.
>
> "1. Pursuant to the May 27, 1987 Instructional Memo, manual calculations of the MEPD [Minimum Eligible Parole Date] at one-third should have already been completed on those inmates who had been removed from the initial life parole consideration hearing calendar and those inmates whose previous decisions were rescinded by the BPT. If these calculations have not been completed, they shall be completed

immediately. The revised MEPD shall then be entered into OBIS [the Offender Base Information System].

"2. When preparing the 90-day calendar, the MEPD of any 15 years to life and 25 years to life inmates shall be recalculated at one-third and rescheduled based upon the one-third calculation. The revised MEPD shall then be entered into OBIS.

"3. Credit losses and restorations affecting the MEPD shall be entered into OBIS as they occur and shall be included in the calculation when scheduling 15 years to life and 25 years to life inmates for their initial parole consideration hearing.

"4. A list of all inmates who are recalculated pursuant to this bulletin and the May 27, 1987, Instructional Memo shall be maintained so that, in the event the Attorney General opinion is ruled invalid, they can be recalculated to include application of earned worktime credits.

"5. Enhancements and consecutive DSL terms shall continue to have earned work incentive credits applied to reduce their terms."

On January 19, 1989, Donnell Jameison ("Requester") filed a Request for Determination with OAL concerning AB 88/24. The Requester contends that "[AB 88/24]. . . is a regulation as defined in Government Code section 11342(b)." He alleges that, "the Department continues to refuse to apply the worktime credit provisions of Penal Code sections 2933 and 2934 to the calculation of the minimum eligible parole dates of the aforementioned classes of lifers."

C. Case Law

Since OAL's February 1988 determination on Administrative Directive No. 87/4 and the issuance of AB 88/24, two California appellate courts have rendered published decisions which clarify the applicability of worktime credits to persons sentenced to life under the indeterminate sentencing law.[42]

In In re Monigold ("Monigold II")[43], the Fourth District Court of Appeal, Division Three, announced its agreement

with the March 1987 Attorney General's Opinion which concluded that state prisoners serving indeterminate sentences of 15 years to life, 25 years to life, or life with the possibility of parole are ineligible for worktime credits under Penal Code section 2933.[44] That court held, however, that the doctrine of equitable estoppel prevented the Board of Prison Terms from converting all of the petitioner's earned "day-for-day" worktime credit to "day-for-two" conduct credit. The court directed the Board of Prison Terms:

> ". . . to allow petitioner the worktime credits he accumulated during the period he was enrolled in the Penal Code section 2933 program until he was notified of his ineligibility and to recalculate his MEPD and initial parole hearing date accordingly."[45]

In In re Oluwa[46], the Second District Court of Appeal, Division Three, focused on the issue of whether Oluwa, a prisoner serving a term of 15 years to life, was entitled to credits under Penal Code section 2933 by virtue of Proposition 7. That court held against Oluwa, finding Oluwa's argument--i.e., that reference to Article 2.5 in Penal Code section 190 included section 2933--was not persuasive when viewed in the light of existing case law.[47]

II. DISPOSITIVE ISSUES

There are two main issues before us:[48]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

A. Part One - Does AB 88/24 Establish Rules or Standards of General Application or a Modification or Supplement to Such Rules or Standards?

The answer is "yes." It is manifest that AB 88/24 establishes standards of general application. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[49] It has been judicially held that "rules significantly affecting the male prison population" are of general application."[50] AB 88/24 is such a rule. Its provisions are intended to apply to all members of a class, i.e., all prisoners serving 25 years or 15 years to life or life with possibility of parole.[51] The Department apparently concedes that AB 88/24 has general application.[52]

B. Part Two - Does AB 88/24 Establish Rules Which Interpret, Implement or Make Specific the Law Enforced or Administered by the Agency or Govern the Agency's Procedure?

The answer to the second part of the inquiry differs depending on the portion of AB 88/24 being reviewed. We note that there are five enumerated provisions contained in AB 88/24. OAL must analyze each separate provision to determine if any or all of the provisions implement, interpret, or make specific the law enforced or administered by the Department, or govern its procedures.

Paragraph introducing the enumerated provisions.

In addition to its other arguments, the Department contends that AB 88/24 is not regulatory because it is a mere statement of intent. The Department asserts that the paragraph introducing the enumerated provisions declares that it "intends to follow the [Attorney General's] Opinion until a court rules upon the matter."[53] The Department goes on to say:

> "At the present time, this paragraph means that the Department will follow the relevant court decision -- In re Monigold [Monigold II]. This portion of the AB is non-regulatory since it instructs the Department's staff to apply the current law to previously established procedures."[54]

The language of AB 88/24 belies the Department's argument. The lead-in sentence to the enumerated provisions of AB 88/24 reads:

> "The following policy shall be immediately implemented for affected inmates until the [Attorney General's] Opinion is either upheld or ruled invalid by the courts." [Emphasis added.]

Contrary to the Departments's view, the above-quoted language does not indicate that the outlined policy shall be applied only when a court has ruled on the Attorney General's Opinion. The quoted language clearly states that the policy shall be implemented until a court has ruled on that opinion. Thus, it is arguable that AB 88/24 became ineffective, by its own terms, after the decision of In re Monigold. For purposes of our analysis, however, we shall view the provisions of AB 88/24 as being in effect.[55]

Paragraph No. 1

The first numbered paragraph of AB 88/24 refers to the Department's May 27, 1987 Instructional Memo, which states in part:

> "Manual calculations of the MEPD [Minimum Eligible Parole Dates] at one-third shall be completed on those inmates who have been pulled off the initial life parole consideration hearing calendar and those inmates whose previous decisions have been rescinded [pursuant to the Board of Prison Terms' Administrative Directive 87/4]. The revised MEPD shall then be entered into OBIS [the Offender Base Information System]."

This portion of AB 88/24 provides that if the manual calculations described in the May 27, 1987 Instructional Memo have not been completed, they shall be completed immediately and entered into the OBIS. It prescribes the Department's procedure for implementing the interpretation of Penal Code section 2933 under the Attorney General's Opinion and AD 87/4.[56] Accordingly, it falls within the definition of a "regulation."

The Department's justification for why the first numbered paragraph of AB 88/24 is not a "regulation" is two-fold. First, the Department argues that the calculations contemplated by the provision have long been completed and therefore the issue of whether or not the provision is a "regulation" is moot. Secondly, it claims that the provision is not regulatory because the mere storage of data does not affect any inmate's rights or responsibilities.

The Department's first argument is not well considered. In essence, the Department is saying that it is irrelevant whether or not the prisoner's MEPD calculations were made under a valid rule (i.e., a "regulation" properly adopted under the guidelines of the APA) since those calculations have already been completed. Such a position is contrary to the very purpose of the APA and is without any merit.

With respect to the Department's second argument, we note that it is being asserted for the first three enumerated provisions of AB 88/24. The Department contends that merely storing data in the OBIS is not regulatory. However, the enumerated provisions do more than that. AB 88/24 provides that the data to be entered into the "Offender Base Information System" must first be calculated in the specified manner. The stored data will undoubtedly be used to calculate when affected inmates will be entitled to an initial life parole consideration hearing. To say that the first three enumerated provisions of AB 88/24 merely require the storage of data is an understatement of the provisions.

Paragraph No. 2

The second numbered paragraph of AB 88/24 requires that the MEPD of any inmate serving 15 years to life or 25 years to life shall be recalculated at a one-third rate and that such inmates be rescheduled for an initial life parole hearing based on that rate. Like the first numbered paragraph of AB 88/24, this provision sets forth a procedure for implementing the Attorney General's conclusion that Penal Code section 2933 does not apply to prisoners serving life sentences under the indeterminate sentencing law. The Department does not dispute this point. Instead, it argues that this provision is not a "regulation" because the provision only repeats the state of the law as declared by Monigold II.[57] The Department is mistaken.

Prior to the issuance of Monigold II, there was no judicial guidance with respect to the issue of whether Penal Code section 2933 (which provides for "day-for-day" worktime credit to prisoners) is applicable to persons sentenced to life imprisonment under Penal Code section 190. The confusion over the proper interpretation of section 2933 was well evidenced by the formal adoption of regulations which granted worktime credits to lifetime prisoners[58] and by subsequent legislative action to clarify the issue.[59,60] Since more than one viable legal interpretation of the applicability of section 2933 to persons serving indeterminate life terms under section 190 was possible,[61,62] OAL determined that the Board of Prison Terms' Administrative Directive 87/4 (which followed the interpretation favored by the Attorney General's Opinion) was a "regulation."

The Department has admitted that AB 88/24 provides procedures for the implementation of AD 87/4.[63] It follows, therefore, that absent a judicial declaration clarifying the proper interpretation of Penal Code section 2933, those portions of AB 88/24 that relate to the implementation of AD 87/4 (i.e., the first two numbered paragraphs) are also regulatory. Accordingly, we conclude that prior to the issuance of Monigold II, paragraphs 1 and 2 of AB 88/24 fell within the APA definition of a "regulation."

We further conclude, however, that the decision reached in Monigold II does not render those portions of AB 88/24 completely non-regulatory. The first and second numbered paragraphs of AB 88/24 provide for the recalculation of the MEPD for affected inmates at a one-third rate. This appears compatible with the clear holding of Monigold II--i.e. that prisoners serving indeterminate life terms under Penal Code section 190 are not entitled to "day-for-day" worktime credits under Penal Code section 2933. In this respect, the

paragraphs now reflect existing law and are thus not "regulations."

The court in Monigold II, however, also ruled that affected inmates are entitled to the worktime credits which they had earned prior to the time they were informed of their ineligibility for such credit and that the MEPD and initial parole hearing dates for such inmates shall be recalculated accordingly. The provisions of AB 88/24 do not provide for such credit. The first and second numbered paragraphs of AB 88/24 do not distinguish between worktime credits earned before or after the time when inmates are notified of their ineligibility for purposes of recalculating the MEPD. Therefore, those provisions do not merely restate the law of Monigold II. Instead, the application of the procedures established by the first two numbered paragraphs of AB 88/24 would appear to conflict with the holding of that case.[64] Since those provisions do not accurately reflect the law announced in Monigold II, the Department's argument for why the second numbered paragraph of AB 88/24 is not a "regulation" is baseless. Insofar as paragraphs 1 and 2 of AB 88/24 conflict with the holding of Monigold II, the paragraphs fall within the APA definition of a "regulation."

Paragraph No. 3

The third numbered paragraph of AB 88/24 provides:

> "Credit losses and restorations affecting the MEPD shall be entered into OBIS as they occur and shall be included in the calculation when scheduling 15 years to life and 25 years to life inmates for their initial parole consideration hearing." [Emphasis added.]

Again, the Department argues that the provision is not a "regulation" because it reflects existing law.[65] In this instance, we agree.

Penal Code sections 2932 and 2933 indicate how conduct and worktime credit may be denied/forfeited and restored.[66] In addition, sections 3043.2 and 3043.3 of Title 15 of the CCR specify the criteria for loss of participation and behavior or worktime credit. The restoration of forfeited worktime credit is governed by section 3327 of Title 15 of the CCR. Although neither the statutes nor regulations expressly state that credit losses and restorations shall be included in the calculation for scheduling 15 years to life and 25 years to life inmates for their initial parole consideration hearing, the absence of any limitation with respect to the applicability of the loss and restoration of credit language contained therein clearly imply application of that language to all inmates who have gained credits under sections 2932 and 2933.[67]

Paragraph No. 4

The fourth numbered paragraph of AB 88/24 states:

> "A list of all inmates who are recalculated pursuant to this bulletin and the May 27, 1987, Instructional Memo shall be maintained so that, in the event the Attorney General Opinion is ruled invalid, they can be recalculated to include application of earned worktime credits." [Emphasis added.]

This provision is easily divisible into two parts. The first of which requires the Department to maintain a list of all inmates who had their MEPD recalculated pursuant to the prescribed one-third rate. This list serves as an administrative tool to implement the second part of the provision--i.e., requiring the recalculation of the MEPD for affected inmates in the event that the Attorney General's Opinion is ruled invalid.

Note that the application of the second part of the provision, which calls for the use of the name list, is conditioned upon a finding that the Attorney General Opinion is invalid. Accordingly, the name list is not to be used until that event occurs. The holding of Monigold II, which upheld the Attorney General's Opinion, now precludes that possibility.

The only portion of the above-quoted provision that became effective, or ever would be effective, is the requirement that a list of affected inmates be maintained.[68] With respect to that portion of the provision, we find that it clearly establishes a procedure to be followed by the Department. Accordingly, the requirement for the maintenance of a name list of affected inmates satisfies both prongs of the definition of a "regulation." As discussed later, however, that conclusion does not end our analysis of this provision.[69]

Paragraph No. 5

The fifth numbered paragraph of AB 88/24 states:

> "Enhancements and consecutive DSL [Determinate Sentencing Law] terms shall continue to have earned work incentive credits applied to reduce their terms."[70] [Emphasis added.]

The Department contends that this provision is a restatement of law as provided by Penal Code section 1170.1.[71] Although the use of the words "continue to" in the provision indicates the Department's belief that those reading the

provision understand that work incentive credits apply to enhancements and consecutive terms, such understanding does not come from a reading of Penal Code section 1170.1. Section 1170.1 governs the calculation of consecutive terms upon conviction of two or more felonies. It makes no mention of the application of worktime credits. Nonetheless, we believe that the application of worktime credit to enhancements and consecutive sentences is the generally understood state of the law.

The 1983 case of In re Monigold ("Monigold I")[72] (not to be confused with the previously discussed 1988 case bearing the same name) is on point. The issue in that case was whether or not an inmate sentenced to an indeterminate term with a determinate enhancement was entitled to earn conduct credit on the enhancement. The court found that "the Legislature intended that conduct credit under section 2931 should apply to all determinate terms, including enhancements."[73] The court stated:

> ". . . we construe the phrase in section 2931 authorizing conduct credit for inmates 'sentenced to the state prison pursuant to section 1170' to mean 'sentenced to the state prison for a determinate term.' In our view, the reference to section 1170 is merely a shorthand way of referring to a determinate term and was used by the Legislature to distinguish such a sentence from an indeterminate one imposed under section 1168, subdivision (b).[Footnote]" [Emphasis added.]

The corresponding footnote to the above-quoted language states:

> "For the same reasons the phrase contained in the newly enacted section 2933, 'sentenced to state prison, under Section 1170' should be similarly construed. (Citation omitted.)"

The Monigold I court clearly indicated that Penal Code section 2933 applies to all determinate terms, including consecutive determinate terms and enhancements.

Section 2120 of Title 15 of the CCR also supports the Department's position. Section 2120 states in part:

> "DSL [Determinate Sentencing Law] and ISL [Indeterminate Sentencing Law] prisoners who have DSL release dates retroactively calculated are entitled to credit for good behavior and participation and may earn work time credit. Good time and work time credit shall be deducted from the DSL release date." [Emphasis added.]

We therefore construe the fifth numbered provision of AB 88/24 as a restatement of existing law--i.e., not a "regulation."

WE THUS CONCLUDE THAT PARAGRAPHS 1, 2, and 4 OF AB 88/24 EACH CONSTITUTE A "REGULATION" AS DEFINED BY GOVERNMENT CODE SECTION 11342, SUBDIVISION (b). PARAGRAPHS 3 AND 5 RESTATE EXISTING LAW AND THEREFORE DO NOT FALL WITHIN THE DEFINITION OF A "REGULATION."

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.[74]

Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application or . . ., except one which relates only to the 'internal management' of the state agency." [Emphasis added.]

The "internal management" exception has been judicially determined to be narrow in scope.[75] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" under review (1) affects only the employees of the issuing agency[76,77] and (2) does not address a matter of serious consequence involving an important public interest.[78,79]

In determining whether an "administrative bulletin" issued by the Department of Corrections falls within the "internal management" exception, the rule can be more easily stated. The Third District Court of Appeal, in Faunce v. Denton,[80] indicated that the appropriate standard to apply in evaluating whether or not portions of the Department's Administrative Manual falls within the "internal management" exception was whether or not the challenged portions represent a "rule of general application significantly affecting the male prison population in the custody of the Department."[81]

Applying that test, we find that the fourth numbered paragraph of AB 88/24 falls within the "internal management" exception. As discussed, the only portion of that provision which ever took effect was the requirement that an affected inmate name list be maintained. The establishment of the list, in itself, does not affect the rights and responsibilities of the male prison population. The only

effect of that requirement is to increase the administrative duty of the employees of the Department.[82]

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) AB 88/24 is subject to the requirements of the APA;

(2) paragraphs 1 and 2 of AB 88/24 fell within the APA definition of a "regulation" prior to the issuance of Monigold II and therefore violated Government Code section 11347.5, subdivision (a);

(3) insofar as paragraphs 1 and 2 reflect the law announced in Monigold II--i.e., that inmates sentenced to indeterminate life terms are not entitled to earn worktime credits--the paragraphs are not regulatory and do not violate Government Code section 11347.5, subdivision (a).

(4) insofar as paragraphs 1 and 2 conflict with the holding of Monigold II--i.e., that inmates sentenced to indeterminate life terms are entitled to all worktime credit earned before being notified of their ineligibility to earn such credits--the paragraphs fall within the APA definition of a "regulation" and therefore violate Government Code section 11347.5, subdivision (a).

(5) paragraphs 3 and 5 of AB 88/24 reflect existing law and therefore do not fall within the APA definition of a "regulation;" and

(6) while paragraph 4 of AB 88/24 falls within the APA definition of a "regulation," it is nonetheless exempt from the requirements of the APA.

DATE: September 21, 1989

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1. This Request for Determination was filed by Donnell Jameison, C-05156, P.O. Box 2000, U-208, Vacaville, CA 95696-2000. The Department of Corrections was represented by Marc C. Remis, Staff Counsel, Legal Affairs Division, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

   To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "459" rather than "1."

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a <u>second</u> survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986, (2) seven pre-1986 cases discovered by OAL after April 1986, and (3) nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as California Administrative Code), section 121, subsection (a), provides:

   > "'<u>Determination</u>' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by

statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

Comments were submitted by Mr. Michael Brodheim, dated July 5, 1989 and by Mr. John E. Dannenberg, dated July 9, 1989. The Department submitted a Response to the Request for Determination on August 14, 1989. The written comments and the Department's response were all considered in this determination proceeding.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

10. (1988) 205 Cal.App.3d 1224, 253 Cal.Rptr. 120, mod. in adv. sheets. 253 Cal.Rptr. yellow pages, p. 10, petition for review denied Feb. 16, 1989.

11. Penal Code section 5000.

12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

13. Penal Code section 5054.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

16. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

17. It is true that American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22, held that the APA did not apply to the Department of Corrections. However, Procunier's authority has been dramatically weakened. See 1989 OAL Determination No. 4 (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1074-1076, 1080-1082; typewritten version, pp. 140-142, 146-148.

18. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

19. Id.

20. For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.

21. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as

> regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]
>
> [This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

22. Hershipps & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)

23. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

24. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

25. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

26. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

27. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810--7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, sections 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p.

1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

28. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

29. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. (1989 OAL Determinations No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).)

30. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

> "Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and

procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

31. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

32. Penal Code section 1170.

33. For a general discussion and history of determinate sentencing and indeterminate sentencing, see In re Monigold ("Monigold I"), (1983) 139 Cal.App.3d 485, 188 Cal.Rptr. 698.

34. There are two other possible sentences that may be imposed for first degree murder--(1) death and (2) confinement in a state prison for life without possibility of parole. (Pen. Code, sec. 190.)

35. Section 190 was subsequently amended (Senate Bill No. 402, Stats. 1987, ch. 1006, sec. 1, p. 166; approved by the Governor on September 22, 1987, filed with the Secretary of State on September 23, 1987, and approved by voters Proposition 67, effective June 8, 1988). The following underlined portions represent additions to section 190:

"Section 190. Murder; degrees; punishment; parole

(a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a) or (b) of Section 830.2, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew or reasonably should have known that the victim was such a peace officer engaged in the performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall not apply to reduce any minimum term of 25 years in state prison when the person is guilty of murder in the second degree and the victim was a peace officer, as defined in this subdivision, and such person shall not be released prior to serving 25 years confinement." [Emphasis added.]

36. Analysis by Legislative Analyst for Proposition 7, "Murder. Penalty--Initiative Statute," November 7, 1978.

37. Section 2931, subdivision (a), provides in part:

"In any case in which a prisoner was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if

the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2."

38. As of January 1, 1988, the California Administrative Code ("CAC") became known as the California Code of Regulations ("CCR").

39. The Department announced permanent adoption of Title 15, CCR, sections 3040 through 3379 (non-inclusive) on November 9, 1988. (See Department's Director's Rule Revision Bulletin No. 88/11.)

40. Eligibility of State Prisoners to Receive Worktime Credits, 70 Ops.Cal.Atty.Gen 49 (1987). The Attorney General's Opinion stated:

> "State prisoners serving sentences of 25 years to life, 15 years to life, or life with possibility of parole are not eligible for worktime credits under Penal Code section 2933." [Emphasis added.]

41. 1988 OAL Determination No. 1 (Board of Prison Terms, February 16, 1988, Docket No. 87-007) California Regulatory Notice Register 88, No. 9-Z, February 26, 1988, p. 623.

42. The case of In re Thompson (1988) 206 Cal.App.3d 275, 253 Cal.Rptr. 513, held in part that prisoners who received life sentences under the indeterminate sentencing law were not entitled to worktime credits under Penal Code section 2933. The Reporter of Decisions was directed not to publish this opinion on February 16, 1989.

43. (1988) 205 Cal.App.3d 1224, 253 Cal.Rptr. 120, mod. in adv. sheets 253 Cal.Rptr. yellow pages, p. 10, petition for review denied Feb. 16, 1989.

44. The comment submitted by Mr. Michael Brodheim again argues that inmates serving indeterminate life terms are eligible for worktime credits under Penal Code section 2933. Regardless of the merits of such arguments, OAL has no authority to review or ignore the holding of an appellate court case.

45. In re Monigold ("Monigold II") (1988) 205 Cal.App.3d 1224, 253 Cal.Rptr. 120, 124.

46. (1989) 207 Cal.App.3d 439, 255 Cal.Rptr. 35.

47. The issue of equitable estoppel was not argued. (Id., 255 Cal.Rptr. at p. 38.)

48. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

49. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

50. Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

51. See Administrative Bulletin No. 88/24; Letter from Department of Corrections to Michael Brodheim, dated September 12, 1988, part IV.

52. In its Response, the Department argues that "AB 88/24 is non-regulatory since it merely repeats existing case law, statutes and regulations, contains statements of intent, or specifies a method of storing data. Additionally, since it contains provisions which have been fully executed, any issue of whether those provisions meet the definition of 'a regulation' is moot." (Response, p. 4.) The Department does not argue that AB 88/24 does not have general application.

53. Response, p. 2, emphasis added.

54. Id.

55. On August 4, 1989, the Department issued Administrative Bulletin No. 89/48 ("AB 89/48"), on the subject of "Recalculation of 15-Life and 25-Life Prisoners' Minimum

Eligible Parole Date Pursuant to In re Monigold [Monigold II]." AB 89/48 specifically states that it supersedes AB 88/24.

Again, we view the provisions of AB 88/24 as being effective for purposes of our analysis.

56. In its Response, the Department clearly admits that, "the AB . . . provides procedures for the Department's implementation of the [Attorney General's] Opinion and the Board of Prison Term Administrative Directive 87/4." (Response, p. 2.)

57. Response, p. 2.

58. See Title 15, CCR, sections 3043 and 3043.1. We note that the Department has not yet repealed or amended those portions of sections 3043 and 3043.1 which are inconsistent with the holding of Monigold II (1988) 205 Cal.App.3d 1224, 253 Cal.Rptr. 120.

59. See Statutes 1988, chapter 121, section 1, page 409, amending Penal Code section 2933. The analysis of Chapter 121 (Senate Bill No. 1265) by the Legislative Analyst, dated May 16, 1988, stated:

> "Current law permits specified inmates to earn worktime credits to reduce their prison sentences by participating in work and educational programs. According to the Department of Justice, first and second degree murderers are ineligible for worktime credits under current law." [Emphasis added.]

The unusual qualifying phrase, "According to the Department of Justice" implies that the Legislative Analyst recognized a contrary view.

60. A review of the legislative history behind Senate Bill No. 1265 shows that it was sponsored by the Attorney General in order to correct a drafting oversight in Senate Bill No. 402 (Stats. ch. 1006, sec. 1, p. 166, approved by voters Prop. 67, effective June 8, 1988). The Attorney General was apparently concerned that reference to Article 2.5 of Chapter 7 of Title 1 of the Penal Code following the adoption of section 2933 into the article would now be viewed as an incorporation of section 2933 into Penal Code section 190 to permit worktime credits to be earned by

inmates serving 15 years to life, 25 years to life or life with possibility of parole.

One of the arguments used by the Attorney General for why section 2933 does not apply to inmates sentenced to indeterminate life sentences under section 190 was that section 190's reference to Article 2.5 was specific and therefore referred to only those sections under Article 2.5 (sections 2930, 2931, and 2932) which existed at the time such reference was made. The Attorney General cited to the seminal case of Palermo v. Stockton Theatres, Inc (1948) 32 Cal.2d 53, 58-59 and its progeny in support of this position.

Those cases, however, could have arguably supported a view that the reference to Article 2.5 in section 190 was a general reference to a body of law, and thus incorporated prospective changes to the article. Of course, such an interpretation is now foreclosed by the holding of Monigold II.

61. See footnote 52 of 1988 OAL Determination No. 1 (Board of Prison Terms, February 16, 1988, Docket No. 87-007) California Regulatory Notice Register 88, No. 9-Z, February 26, 1988, p. 623.

Unlike the court in Monigold II, OAL was not required to determine the correctness of the Attorney General's Opinion. Our role was merely to determine whether there was more than one legally tenable interpretation concerning the application of Penal Code section 2933 worktime credits to inmates serving indeterminate life terms. Certainly, there was. (See, e.g., Legislative Counsel's Digest for Senate Bill No. 402, Stats. 1987, ch. 1006, sec. 1, p. 166--which stated "Worktime . . . credits apply to reduce a minimum term of 15 years, . . .") The Monigold II court simply found the Attorney General's view to be the more persuasive of the two competing interpretations.

62. Compare with 1988 OAL Determination No. 10 (Department of Corrections, June 22, 1988, Docket No. 87-016), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, P. 2313, in which OAL found that the Department's policy was not a "regulation" because it was the only legally tenable interpretation of the underlying law.

63. See Response, p. 2.

64. The comment submitted by Mr. Michael Brodheim, dated July 5, 1989, states, "To the extent then that AB 88/24 does not provide for reinstatement of any worktime credits earned during the period of an inmate's enrollment in the section 2933 program (i.e., prior to notification of the inmate's 'ineligibility'), AB 88/24 is not consistent with the Monigold [II] court's decision." (Brodheim Comment, p. 5.) In its Response, the Department states that it "generally denies each and every conclusion and opinion stated in . . . Mr. Brodheim's 'Public Comment.'" (Response, p. 1.) The Department does not, however, directly address the issue raised in that comment. In fact, the Department's response is devoid of any mention of that portion of the Monigold II decision relating to equitable estoppel.

65. The Department states, "[Penal Code] Sections 2932 and 2933 as well as In re Ramirez (1985) 39 Cal.3d 931, 218 Cal.Rptr. 324, provide credit losses and restorations for all inmates including lifers." (Response, p. 3.)

66. See also Title 15, CCR, sections 3043.2 and 3043.3.

67. Note that we are not indicating that section 2933 applies to all inmates. However, it is obvious that if Penal Code section 2933 did apply to life term prisoners under Penal Code section 190, then the loss and restoration language of section 2933 would equally apply.

68. Even assuming arguendo that the Attorney General's Opinion had been declared invalid so as to trigger full application of the provision to restore worktime credits to those inmates who had worktime credit calculated out of their MEPD, we would nonetheless view the preparation of the name list as an administrative function to implement existing law. Section 3043 of Title 15 of the CCR, which is still in effect, provides that inmates serving indeterminate life sentences can earn worktime credits. The invalidation of any legal impediment which worked to deny inmates of their earned worktime credit under section 3043, must ultimately result in the restoration of such credit on due process grounds. The name list simply aids in this process.

69. Here again, the Department argues that the issue of whether or not this provision is a "regulation" is moot because the prescribed calculations have already been completed. Again, we reject that argument.

70. This same provision is included in the Department's Administrative Bulletin 89/48, which supersedes AB 88/24.

71. See Response, p. 3.

72. (1983) 139 Cal.App.3d 485, 188 Cal.Rptr. 698. The previously discussed Monigold II case ((1988), 205 Cal.App.3d 1224, 253 Cal.Rptr. 120), which also concerned the same inmate, was decided by a different district court of appeal.

73. Monigold I (1983) 139 Cal.App.3d 485, 489, 188 Cal.Rptr. 698, 701.

74. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without

protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

75. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

76. Id., Armistead, Stoneham I, and Poschman.

77. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.

78. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.

79. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.

80. (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

81. Id., 167 Cal.App.3d at p. 196, 213 Cal.Rptr. at p. 125, citing Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, 135 and Stoneham v. Rushen (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20.

82. The Department already requires that certain information be maintained for all inmates. (See Tit. 15, CCR, secs. 2081-2088 ("Information Practices Act").) The establishment of a list of affected inmates merely involves some shuffling of information.

83. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.